COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: W. Eugene Davis, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: May 8, 2000

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on January 10-11, 2000, in Orlando, Florida and on April 25-26 in New York City and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of those meetings are included at Appendix E.

II. Action Items — Summary and Recommendations

This report includes three action items:

- Approval for publication of Criminal Rules 1 to 60 in two separate packages;
- Approval for publication of proposed changes to the Rules Governing § 2254 and § 2255 Proceedings (Habeas Rules); and
- Approval of new Rule 12.4 (financial disclosure statements) for publication and comment.

A. Publication of Restyled Criminal Rules 1-60 — Summary

The Committee has been working on restyling the Rules of Criminal Procedure since 1999. Those discussions have taken place at five full Committee meetings and at a series of subcommittee meetings. In January 2000, the Standing Committee approved the publication of Criminal Rules 1 to 31, subject to some suggested editing and revisions.

This report addresses the proposed changes to Rules 32 through 60. The rules and the accompanying Committee Notes are at Appendix A. The Committee requests that the amendments to those rules be approved for public comment. The "style" package is appended as Appendix A.

B. Separate Publication of Amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43 — Summary

A number of proposed amendments were under active consideration by the Criminal Rules Committee before the restyling project was begun. In addition, during the restyling effort, the Committee identified several amendments that might be considered controversial or significant changes in current practice. The Committee believes that it would be appropriate to publish these rules — which also contain the style changes — as a separate package in order to highlight those proposed changes for the bench and the bar. Those amendments are attached as Appendix B.

C. Publication of Proposed Amendments to Rules Governing §§ 2254 and 2255 Proceedings — Summary

The Committee conducted a review of the Rules Governing §§ 2254 and 2255 Proceedings to determine if any changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes. As a result, the Committee has proposed a number of amendments to those rules and recommends that they be published separately for public comment. Those proposed amendments are attached at Appendix C.

D. Publication of Proposed New Rule 12.4, Disclosure Statement

The Criminal Rules Committee has proposed a new Rule 12.4 to mirror similar amendments to Appellate Rule of Procedure 26.1 and Civil Rule of Procedure 7.1, with some modifications. A copy of the

proposed rule and accompanying committee note are attached at Appendix D.

III. Restyling Project

* * * * *

B. Proposed Separate Publication of Rules

The Committee recommends that Standing Committee approve publication of the changes to Rules 1 to 60 in two separate packages. The purpose of separating these two packages — although somewhat duplicative — is to make it clear to the public that there are some rules that deserve special attention.

The first package — referred to as the "restyle" package, includes Rules 1 to 60. For those rules where the Committee is proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 35, 41, and 43), the language containing those major changes has been deleted from the "style" package. A proposed "Reporter's Note" explains to the public that additional substantive changes for that particular rule are being published simultaneously in a separate package.

The second package — referred to as the "substantive" package, consists of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and again, a proposed Reporter's Note explains that another version of each of these rules (which includes only style changes) is being published simultaneously in a separate

package. Rules, such as Rule 11, which have been completely reorganized, were not included because they did not appear to include what could be considered significant changes in substance or practice.

IV. ACTION ITEM—Restyling Project—Publication of Rules for Comment

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

A. Proposed Amendments in Rules 1 to 31

1. In General

Following the Standing Committee Meeting in January, the Advisory Committee considered suggested revisions made by members of the Standing Committee, both at the meeting and in later communications. Most of those changes were accepted and incorporated into Rules 1 to 31.

The following discussion briefly addresses significant, nonstyle, changes that were made in Rules 1 to 31 following the Standing Committee meeting.

2. Rule 5. Initial Appearance

During the process of reviewing Rules 32-60, the Committee concluded that portions of Rule 32.1 (Revoking or Modifying Probation or Supervised Release) and Rule 40 (Commitment to Another District) would be better suited for Rule 5. A subcommittee was formed and ultimately recommended that Rule 5 be expanded to cover all initial appearances, including those cases where the person

has been arrested for failing to appear in another district, or for violating a term of probation or supervised release. The Rule now also deals with transfers to another district.

The version of Rule 5 presented to the Standing Committee in January 2000 included a provision for conducting video teleconferencing for initial appearances — if the defendant consents. At its meeting in April, the Advisory Committee reconsidered that proposal and concluded that it would be helpful to publish not only that provision but also an alternate provision that would permit the court to conduct such procedures, even without the defendant's consent. Thus, the substantive package version of Rule 5(f) includes alternative proposals. The Committee Note addresses the two alternatives.

Because Rule 5 contains an amendment that was being considered apart from the restyling project (video teleconferencing), the Committee has included this rule in the "substantive" package for publication.

3. Rule 10. Arraignments

Rule 10 is being included in the "substantive" package of amendments due to the fact that it includes the proposed amendment to video teleconferencing — a proposal that had been under consideration before the restyling project began. As with Rule 5, *supra*, the version of Rule 10 presented to the Standing Committee in January 2000 included a provision for conducting video teleconferencing for arraignments — if the defendant consents. The Advisory Committee reconsidered that proposal and concluded that it would be helpful to publish not only that provision but also an alternate provision that would permit the court to conduct such

procedures, even without the defendant's consent. Thus, the substantive package version of Rule 10 includes alternative proposals.

* * * * *

5. Rule 26. Taking Testimony

The Committee considered its proposed amendment to Rule 26 concerning remote transmission of testimony and its possible impact on Federal Rule of Evidence 804. The Committee has narrowed the grounds of unavailability for using such procedures — Rule 804(a)(1)-(3) seemed inapplicable — but it has not taken any other action that might explicitly address the interplay in the Rule and the ability of a proponent to admit hearsay statements under Rule 804 if the declarant is in effect "available" to give remote testimony. The Committee views remote transmission of live testimony to be preferable to other hearsay evidence, even if it is in the form of a deposition or other recorded testimony.

B. Proposed Amendments to Rules 32 to 60

The Advisory Committee discussed proposed style changes to Rules 32 to 60 at a special meeting in January 2000, at two subcommittee meetings, and finally, at its regularly scheduled meeting in April 2000, in New York City.

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

1. Rule 32. Sentencing and Judgment

Rule 32 has been completely reorganized to make it easier to follow and apply; the sequencing of the provisions has been changed. For example, the definitions in the rule had been moved to the first sections.

The proposed rule includes one change that may generate controversy. The Committee considered whether to retain revised Rule 32(h)(3)(A) (portions of current Rule 32(c)(1)). Some members believed that the provision, which requires the court to rule on all unresolved objections to the presentence report, placed an unnecessary burden on the court. Others noted that the Bureau of Prisons regularly relies upon the presentence report to make important decisions about post-sentencing disposition of defendants, for example, designating them for a particular confinement facility. Ultimately, the Committee adopted language that would require the sentencing judge to rule on all unresolved objections to a "material" matter in the report. For all other unresolved objections the judge may either rule on them or conclude that the objections affect matters that will not be considered in imposing an appropriate sentence. The Committee envisions that a "material" matter would include those matters that would typically impact on treatment of the defendant in the prison system.

Because of this significant amendment, the Committee decided to include it in the "substantive" package.

* * * * *

3. Rule 35. Correcting or Reducing a Sentence

The Committee decided to delete current rule 35(a) in its entirety. Rule 35(a)(1) was considered unnecessary. Rule 35(a)(2) was also considered unnecessary; it should be very clear to a district court that further sentencing proceedings are necessary following a decision by a court of appeals on the issue of whether the sentence was correct.

Rule 35 includes a substantive change that had been under consideration apart from the restyling project. That amendment, in Rule 35(b) includes new language to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. The current rule, however, did not address the issue. The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

The amendment to Rule 35(b) makes clear that a sentence reduction motion is permitted in those instances identified by the court

in *Orozco*. The proposed amendment would not eliminate the one-year requirement as a generally operative element.

Rule 35 is one of those rules that are also included in the substantive package for publication.

* * * * *

5. Rule 41. Search and Seizure

Rule 41 has been completely reorganized and includes a substantive amendment that may generate some controversy. The substantive amendment would permit officers to seek a warrant to conduct "covert entry" searches, e.g., where officers seek a warrant to examine or monitor activities in a covert manner. The Committee discussed this proposed change at length. Although two circuits have approved such searches, several members of the Committee believed that the amendment was premature and that any change in the rule should await further caselaw developments. Ultimately, a motion to remove this provision from Rule 41 failed by a close vote.

Rule 41(b) also includes a possible change in practice by stating a clear preference for seeking a warrant from a magistrate judge; the current rule states no preference. The Committee Note indicates that the Committee does not intend to create any new ground for contesting the validity of a search warrant.

Rule 41 has been included in the "substantive" package for publication.

* * * * *

7. Rule 43. Presence of the Defendant

Portions of Rule 43 have been reorganized and depending upon the disposition of proposed amendments to Rules 5 and 10, regarding presence of the defendant where video teleconferencing is used for initial appearances and arraignments, Rule 43 will also have to be amended. Thus, Rule 43 has been included in the substantive package for publication, along with Rules 5 and 10.

* * * * *

Recommendation — The Committee recommends that Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43 be approved and separately published for public comment.

V. ACTION ITEM — Publication of Amendments to Rules Governing § 2254 and § 2255 Proceedings for Comment

Over the past year, the Criminal Rules Committee has conducted a review of the Rules Governing §§ 2254 and 2255 Proceedings to determine if any changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes. As a result, the Committee has proposed a number of amendments to those rules and recommends that they be published separately for public comment. Those proposed amendments are attached at Appendix C.

* * * * *

The amendments to Rule 2 in both sets of rules is intended to conform the rules to language in Federal Rule of Civil Procedure 5(e). In addition, Rule 2 of the Rules Governing § 2255 Proceedings has

been amended to make use of the term "movant" consistent throughout those rules.

Amendments to Rule 3 in both sets of rules is intended to reflect the practice set out in Federal Rule of Civil Procedure 5(e) — that the clerk files the papers and refers the matter to the court for consideration of any defects in the petition or the motion.

Rules 8 and 10 of both sets have been amended to reflect the change in title of magistrate judges to United States magistrate judges. [In addition, Rules 6 and 8 of both sets have been amended to reflect the change in designation of 18 U.S.C. § 3006A.]

Finally, Rule 9 in both sets of rules has been amended to reflect amendments to 28 U.S.C. § 2244, where Congress limited the ability of petitioners and movants to obtain relief on successive actions; under the amendments, the person seeking relief must first obtain approval from a court of appeals before filing a second or successive petition.

The proposed amendments and Committee Notes are at Appendix C to this report.

*Recommendation — The Committee recommends that Rules * * *, 2, 3, 6, 8, 9 and 10 of the Rules Governing § 2254 Proceedings and Rules * * *, 2, 3, 8, 9, and 10 of the Rules Governing § 2255 Proceedings be approved and separately published for public comment.*

VI. ACTION ITEM — Publication of Rule 12.4 for Comment

The Criminal Rules Committee has recommended that new Rule 12.4 be promulgated to address the issue of filing disclosure

statements with the court. Similar amendments are being proposed in Appellate Rule 26.1 and Civil Rule 7.1. Although Rule 12.4 closely tracks those two rules in most respects, Rule 12.4(b) includes a requirement that the government disclose to the court the identities of any organizational victims in the case. While the scope of the Civil and Appellate Rules are limited to corporate parties, Rule 12.4 would extend the disclosure requirement to organizational victims which would include business associations and partnerships. The Committee believed that the ethical rules require judges to recuse themselves if they have a financial interest in an organizational victim. Absent such disclosure, a judge may not know the identity of the organizational victim.

The proposed Rule and Committee Note are at Appendix D to this report.

Recommendation — The Committee recommends that new Criminal Rule 12.4 be approved and published for public comment.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

~~**Rule 5. Initial Appearance Before the Magistrate Judge**~~

~~**(a) In General.** Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the~~

---

* New matter is underlined; matter to be omitted is lined through.

~~magistrate judge shall proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.~~

~~**(b) Misdemeanors and Other Petty Offenses.** If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.~~

~~**(c) Offenses Not Triable by the United States Magistrate Judge.** If the charge against the defendant is not triable~~

~~by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute~~

~~or in these rules. A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary~~

~~examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.~~

Rule 5. Initial Appearance

(a) In General.

(1) ***Appearance Upon Arrest.***

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for a violation of probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) **Complaint Required.** If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(c) Initial Appearance; Transfer to Another District.

(1) ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) ***Arrest in a District Other Than the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there;

(B) the judge must inform the defendant of the provisions of Rule 20;

(C) if the defendant was arrested without a warrant, the district court where the prosecution is pending must first issue a warrant before the magistrate judge transfers the defendant to that district;

(D) the judge must conduct a preliminary hearing as required under Rule 5.1 or Rule 58(b)(2)(G);

(E) the judge must transfer the defendant to the district where the prosecution is pending if:

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of

either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(F) when a defendant is transferred or discharged, the court must promptly transmit the papers and any bail to the clerk in the district where the prosecution is pending.

(d) Procedure in a Felony Case.

(1) *Advice.* If the offense charged is a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) ***Consultation with Counsel.*** The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules.

(4) ***Plea.*** A defendant may be asked to plead only under Rule 10.

(e) **Procedure in a Misdemeanor Case.** If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant waives the right to be present.

[ALTERNATIVE VERSION]

(f) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such

appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule where a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the caselaw reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when the an arrest occurs outside the United States. *See, e.g.*, *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes — and the rule so

provides — that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer.

Rule 5(a)(2)(A) consists of language currently located in Rule 5 that addresses the procedure to be followed where a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for violating probation or supervised release, or for failing to appear in another district, Rules 32.1 or 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies, and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision and sets out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1) the defendant must be taken to a magistrate judge in that district. If no magistrate judge is reasonably available, a state or local judicial officer may conduct the initial appearance. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those

instances, the defendant must be taken to a magistrate judge within the district of arrest, unless the appearance can take place more promptly in an adjacent district. The Committee recognized that in some cases, the nearest magistrate judge may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d), derived from current Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision and the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

[**Alternate Version for Video Teleconferencing—Defendant's Consent Required.** The major substantive change is in new Rule 5(f), which permits video teleconferencing for an appearance under this rule, if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally require the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of using video teleconferencing, as long as the defendant consents to that procedure.

The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Nor does the rule specify any particular technical requirements regarding the system to be used.]

[Alternate Version for Video Teleconferencing—Defendant's Consent Not Required: The major substantive change is in new Rule 5(f), which permits video teleconferencing for an appearance under this rule, even if the defendant does not consent. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally require the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in appropriate circumstances the court should have the option of using video teleconferencing, even if the defendant does not consent to that procedure. The question of when it would be appropriate to do so is not spelled out in the rule. That is left to the court in each case. Nor does the rule specify any particular technical requirements regarding the system to be used.]

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes

will result in significant changes in current practice. Rule 5 is one of those rules. In revising Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances. Another version of Rule 5, which does not include proposed Rule 5(f) is being published simultaneously in a separate pamphlet. The version published here, in turn, includes two alternatives for conducting video teleconferences. One version requires that the defendant consent to the procedure. The other version does not require a defendant's consent. The Committee decided to publish alternate versions to obtain a wider range of public comments on the proposal, and in recognition of the view of some that if the defendant is required to consent, video teleconferencing will rarely be used and its benefits largely unrealized.

~~**Rule 5.1. Preliminary Examination**~~

~~**(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence.~~

~~Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.~~

~~**(b) Discharge of Defendant.** If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.~~

~~**(c) Records.** After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding.~~

~~(1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.~~

~~(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security~~

~~therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.~~

~~**(d) Production of Statements.**~~

~~**(1) In General.** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.~~

~~**(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under~~

~~Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.~~

Rule 5.1. Preliminary Hearing in a Felony Case

(a) In General. If a defendant is charged with a felony, a magistrate judge must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted; or

(3) the government files an information under Rule 7(b).

(b) Election of District. A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later

than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.

(d) **Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(e) **Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate

judge must promptly require the defendant to appear for further proceedings.

(f) **Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

(g) **Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment as required by applicable Judicial Conference regulations.

(h) Production of Statements.

(1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.

(2) ***Sanctions for Failure to Produce Statement.*** If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument,

and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. The Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d) contains a significant change in practice. The revised rule includes language that expands the authority of a United States magistrate judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, the rule authorizes a magistrate judge to grant a continuance only in those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. The proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances when the defendant objects. The Committee believes that this restriction is an anomaly and that it can lead to needless consumption of judicial and other resources. Magistrate judges are routinely required to make probable cause determinations and other difficult decisions regarding the defendant's liberty interests, reflecting that the magistrate judge's role has developed toward a higher level of

responsibility for pre-indictment matters. The Committee believes that the change in the rule will provide greater judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary hearing. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, ... issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 is one of those rules. In revising Rule 5.1, the Committee decided to also propose a substantive change that would permit a United States magistrate judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. Another version of Rule 5.1 that does not include that proposed change is being published simultaneously in a separate pamphlet.

~~**Rule 10. Arraignment**~~

~~Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.~~

Rule 10. Arraignment

(a) In General. Arraignment must be conducted in open court and must consist of:

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

(b) **Waiving Appearance.** A defendant need not be present for the arraignment if:

(1) the defendant has been charged by indictment or misdemeanor information;

(2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) the court accepts the waiver.

(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant if the defendant waives the right to be arraigned in open court.

[ALTERNATIVE VERSION]

(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Read together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment. *See, e.g.*, *Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990) (Rules 10 and 43 are broader in protection than the Constitution). The amendments to Rule 10 create two exceptions to that requirement. The first provides that the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. The second permits the court to hold arraignments by video teleconferencing when the defendant is at a different location. A conforming amendment has also been made to Rule 43.

In amending Rule 10 and Rule 43, the Committee was concerned that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak

with the defendant at the arraignment, especially when there is a real question whether the defendant actually understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence. The question of when it would be appropriate for a defendant to waive an appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's absence might be, the defendant's right to be present in court stands unless he or she waives that right in writing. Under the amendment, both the defendant and the defendant's attorney must sign the waiver. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate when the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance,

the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute, (see Rule 11(a)(4)), or entering a conditional plea, (see Rule 11(a)(2)), a nolo contendere plea, (see Rule 11(a)(3)), or a guilty plea, (see Rule 11(a)(1)). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

[**Alternate Version for Video Teleconferencing—Defendant's Consent Required.** Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, if the defendant waives the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g.*, *Valenzuela-Gonzales v. United States*, *supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5(f) that would permit initial appearances to be conducted by video teleconferencing.

The arguments for opposing video teleconferencing of arraignments generally parallel those noted, *supra*, for permitting the defendant to waive the right to be personally brought before a judicial officer. Yet, if one accepts the argument that the defendant may voluntarily waive a personal appearance altogether at the arraignment, the same defendant should be able to consent to an arraignment from a remote location. Further, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That potentially presents security risks to law enforcement and court personnel.

Although the rule requires the defendant to waive a personal appearance for an arraignment, the rule does not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court. It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference.]

[Alternate Version for Video Teleconferencing—Defendant's Consent Not Required. Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, even if the defendant does not waive the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g.*, *Valenzuela-Gonzales v. United States*, *supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place

in open court; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5 that would permit initial appearances to be conducted by video teleconferencing. In providing for video teleconferencing of arraignments, even without the consent of the defendant, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That potentially presents security risks to law enforcement and court personnel. The Committee believed that the beneficial use of video teleconferenced arraignments would be lost if the defendant's consent was required. Indeed, the pilot programs noted, *supra*, were hampered by the fact that defendants rarely consented to the use of video teleconferencing.]

The amendment leaves to the courts the decision first, whether to permit video arraignments, and second, the procedures to be used. The Committee was satisfied that the technology has progressed to the point that video teleconferencing can address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other, either at the same location or by a secure remote connection.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 is one of those rules. This proposed revision of Rule 10 includes an amendment that would permit the defendant to waive any appearance at an arraignment and a second amendment that would permit use of video teleconferencing for arraignments. Another version of Rule 10, which does not include these significant amendments is being published simultaneously in a separate pamphlet. This version of Rule 10, in turn, includes alternate language relating to video teleconferencing, with or without the defendant's consent. One version requires that the defendant consent to the procedure. The other version does not require a defendant's consent. The Committee opted to publish alternate versions to obtain a wider range of public comments on the proposal, and in recognition of the view of some that if the defendant is required to consent, the beneficial uses of video teleconferencing will rarely be used.

~~**Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition**~~

~~**(a) Defense of Insanity.** If a defendant intends to rely upon the defense of insanity at the time of the alleged offense,~~

~~the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~**(b) Expert Testimony of Defendant's Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may~~

~~direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~**(c) Mental Examination of Defendant.** In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal~~

~~proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.~~

~~**(d) Failure to Comply.** If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.~~

~~**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.~~

Rule 12.2. Notice of Insanity Defense; Mental Examination

(a) **Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to do so cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) **Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court

directs — notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.

(c) Mental Examination.

(1) ***Authority to Order Examination; Procedures.***

(A) The court may upon motion of an attorney for the government order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b)

the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) ***Disclosing Results and Reports of Capital Sentencing Examination.*** The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(3) ***Disclosing Results and Reports of the Defendant's Expert Examination.*** After disclosure under Rule 12.2(c)(2) of the results and reports of the

government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(4) ***Inadmissibility of a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant:

(A) has introduced evidence of incompetency or after notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence after notice under Rule 12.2(b)(2).

(d) Failure to Comply. If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The substantive changes to Rule 12.2 are designed to address five issues. First, the amendments clarify that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, the amendments address the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of mental condition during capital sentencing proceedings and when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case.

Under current Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial

notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-64 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

A change to Rule 12.2(c)(1) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the subdivision implies that the trial court has discretion to grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, requires the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms Rule 12.2(c) to the statute. Any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear, the authority under the rule to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority under the rule to order a mental

examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. The court noted first that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. § 4242, because that provision relates to situations when the defendant intends to rely on the defense of insanity. The court also rejected the argument that the examination could be ordered under Rule 12.2(c) because this was, in the words of the rule, an "appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c)(1)(B) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1767 (1999).

The amendment to Rule 12.2(c)(1) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

The amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the defendant's mental condition (apart from insanity). As currently provided in the rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not

amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In so doing, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. § 4241, et. seq.

Additional changes address the question when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. *See, e.g.*, *Powell v. Texas*, 492 U.S. 680, 683-84 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992); *Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987); *United States v. Madrid*, 673 F.2d 1114, 1119-21 (10th Cir. 1982). That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997). Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so can consume time and resources. *See, e.g., United States v. Hall, supra*, 152 F.3d at 398 (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Except as provided in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" — expert or otherwise. As amended, Rule 12.2(c)(4) provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed

that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois*, 484 U.S. 400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983)).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 is one of those rules. As outlined in the Committee Note, this proposed revision of Rule 12.2 includes five substantive amendments. Another version of Rule 12.2, which does not include these significant amendments, is being published simultaneously in a separate pamphlet.